Supreme Court, U. S.
FILED
JAN 5 1978
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-969

THOMAS HAMLIN McGARRITY, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OVID C. LEWIS
1401 Dixie Highway
Covington, Kentucky 41011

Counsel for Petitioner

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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The Petitioner, THOMAS HAMLIN McGARRITY, JR., respectfully prays that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 3, 1977 and November 7, 1977.

OPINION BELOW

The judgments and the opinion of the Court of Appeals, *United States* v. *McGarrity*, 559 F. 2d 1386 (5th Cir. 1977), rehearing denied 564 F. 2d 98 (1977), appear in the Appendix hereto. No opinion was rendered by the District Court for the Western District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 3, 1977 and a rehearing was denied on November 7, 1977. Time for filing a petition for certiorari was duly extended up to and including January 6, 1978, by order of Justice Powell filed on November 29, 1977, and this petition is therefore timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). See also Rule 22 (2).

QUESTIONS PRESENTED

1. Whether the decision below sustaining the search of Petitioner's alleged co-conspirator's luggage is in direct conflict with *United States* v. *Chadwick,* 97 S. Ct. 2476 (1977), and the justification given that *United States* v. *Chadwick,* 97 S. Ct. 2476 (1977), is not retroactive presents a question of such importance and significance that it should be resolved by this Court.

2. Whether the decision of the Fifth Circuit that the evidence was sufficient to convict Petitioner-McGarrity conflicts with applicable decisions of this Court and decisions of other Circuit Courts of Appeals.

3. Whether the decision by the court below that unrecorded bench conferences constitute harmless error is an erroneous determination of an important question of Federal law which has not been but should be settled by this Court.

4. Whether the determination below that it is permissible for an Appellate Judge to decide a case involving a matter in which he appears prejudiced is in conflict with applicable decisions of this Court.

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 455 (a) provides, in pertinent part:

> Any justice, judge, magistrate or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28, United States Code, Section 753 provides, in pertinent part:

> (a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.
>
> . . . .
>
> (b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

Title 21, United States Code, Section 841 (a) provides, in pertinent part:

> (a) Except as authorized by this subchapter, it shall

be unlawful for any person knowingly or intentionally—

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Title 21, United States Code, Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Thomas Hamlin McGarrity, Jr., hereinafter Petitioner, was convicted under 21 U.S.C. § 846 of conspiracy to possess heroin, a Schedule I Controlled Substance, with intent to distribute. In addition to the conspiracy charge, the original indictment had charged Petitioner with violation of 21 U.S.C. §§ 952 (a) and 960 (a) (1), importing heroin, a Schedule I Controlled Substance, into the United States from Mexico; and 21 U.S.C. § 841 (a) (1), possession of heroin, a Schedule I Controlled Substance, with intent to distribute the same. These charges were listed in Counts One, Two, and Three, respectively, of the indictment. A plea of not guilty was entered. A jury found Petitioner guilty on Count One of the indictment, acquitted him on Count Three, and Count Two was dismissed on the motion of the Government. The Petitioner filed a motion for acquittal based on insufficiency of the evidence both at

the conclusion of the State's case and at the end of the case. (Trial Transcript [hereinafter designated as Tr.] 207, 232.) Both motions were denied. (Tr. 208-209, 232.)

The Petitioner also filed a motion to suppress based on an allegation of an unlawful search. Said motion was denied. (Motion for Suppression Hearing Transcript [hereinafter designated as M] 47, Tr. 200.)

Petitioner perfected an appeal to the United States Court of Appeals for the Fifth Circuit, contending his conviction was invalid in that (1) the Government had adduced insufficient evidence to justify a conspiracy conviction; (2) the District Court committed reversible error in failing to grant Petitioner's motion to suppress the use as evidence of the heroin seized since it was detained as the result of an unlawful search and seizure of personal luggage in a private airplane; and (3) the failure of the court reporter to record portions of significant bench conferences constituted reversible error.

On October 3, 1977, the Fifth Circuit Court of Appeals affirmed the Petitioner's conviction, stating in its opinion that (1) the evidence adduced was sufficient to sustain the conspiracy conviction; (2) the search of the airplane and subsequent search of luggage and seizure of heroin found therein were lawful; and (3) the failure of the court reporter to record bench conferences did not warrant reversal. (Appendix, pages 7a, 8a.)

On October 15, 1977, Petitioner filed a petition for rehearing in banc with the Fifth Circuit Court of Appeals, contending, *inter alia,* that the panel that decided his appeal was improperly constituted since one of the three judges on the panel had a preconceived notion of the sufficiency issue and therefore could not act with the con-

stitutionally required impartiality and objectivity. Petitioner's petition for rehearing in banc was denied by the Fifth Circuit Court of Appeals on November 7, 1977. (Appendix, page 11a.)

Subsequently, Petitioner obtained a sworn statement from one of the original alleged co-conspirators, Ruby Swartz. The affidavit dated November 16, 1977, raised serious questions concerning the fairness of Petitioner's trial and even of prosecutorial misconduct. Accordingly, on November 22, 1977, Petitioner filed with the Fifth Circuit Court of Appeals a motion for remand to the District Court for filing a motion for new trial and for recall and stay of execution of mandate pending determination of motion for new trial by the District Court. The Fifth Circuit Court of Appeals denied Petitioner's motion on December 16, 1977. (Appendix, page 12a.)

In the interim, Petitioner applied to Justice Lewis F. Powell, Jr., for a thirty-day extension of time for filing a petition for a writ of certiorari pursuant to U.S Sup. Ct. Rule 22 (2) , 28 U.S.C.A. Petitioner's petition was granted by Justice Powell on November 29, 1977, the time for filing a petition for writ of certiorari extended to and including January 6, 1978. (Appendix, page 13a.)

STATEMENT OF FACTS

The Record reveals that on April 20, 1976, Special Agent Ruric N. Staton of the Drug Enforcement Administration, received information from a confidential, sometimes reliable, informant that a black male and a black female had come to El Paso for the purpose of obtaining heroin. (M 43.) No information concerning McGarrity was relayed. The informant told Agent Staton that the couple would

stay at the Rodeway Inn in El Paso, Texas, for several days. No names were given at the time, but the black male was described as having grey hair and a grey beard and wearing a canvas hat similar to a sailor hat. (M 19.) Following receipt of this information, Agent Staton established surveillance of the Rodeway Inn, and ascertained that a black male and female somewhat similar in appearance to the informant's description were registered in Room 186 of the Rodeway Inn. The black male was registered under the name of Ken Watson. Nothing unusual occurred on April 20, 1976. (M 18-19, Tr. 14-16.)

On April 21, 1976, Agent Staton was joined by Customs Air Detail Officer Ruben Gomez in the surveillance. Agent Gomez told Agent Staton that his service had an aircraft owned by Arthur Brown under surveillance, which was located at a private aircraft facility, the Southwest Air Rangers Field in El Paso. (M 12-15, Tr. 136.) On the afternoon of the 21st of April, 1976, Agents Staton and Gomez observed McGarrity in company with Ruby Louise Swartz and a third negro male, later identified as Paul L. Montgomery, a co-defendant. Paul L. Montgomery was the male who had registered as Ken Watson. The three took photographs of each other, and appeared to be in conversation. Agent Staton ascertained that McGarrity had registered into the motel using the name Tim McNary. (Tr. 19.) Nothing extraordinary or suspicious occurred. (M 33.)

On April 22, 1976, Customs Officer Gomez overheard Ruby Louise Swartz tell another party on the telephone that she was "with Paul." (Tr. 139, 140.)

Shortly after midnight, April 23, 1976, Agent Staton received another call from his informant and was told that when "the people left town they would be in possession of a large amount of heroin." (M 24.) In the early morn-

ing hours of April 23, 1976, Agents Staton and Gomez observed McGarrity leave the motel with his luggage, and proceed to the Southwest Air Rangers Field adjacent to El Paso International Airport, where he walked to a small airplane parked on the airstrip. (Tr. 44, 146.) Subsequently the Agents saw co-defendant Montgomery and Ruby Louise Swartz leave the motel with their luggage and when they arrived at the airport, the Agents also saw co-defendant Montgomery and Ruby Louise Swartz talking with a man whom they took to be of Mexican descent driving an automobile with red and white license plates, which the agents recognized as similar to Frontera Chihuahua license plates, although they could have been plates of an U.S. State. (M 30, Tr. 50, 51, 147, 148.) McGarrity and his alleged co-conspirators, Montgomery and Swartz, boarded the aircraft owned by Arthur Brown and were preparing to leave when they were arrested by Gomez and Staton. The three suspects were ordered to line up against the plane and searched for weapons. (Tr. 57.) No weapons were found during this search. Subsequently, Agent Staton entered the plane and searched some of the personal luggage of Paul Montgomery in which he found heroin. (Tr. 59.) No narcotics were found on Petitioner or in his luggage. (Tr. 65, 85.) The agents had neither arrest nor search warrants. (M 25, 26.) The plane was then locked and subsequently flown by U.S. Customs Pilot Bill Eddleman to an Army Air Field 1-2 miles north of the Southwest Air Rangers Field. (Tr. 158-159.) During the period of the arrest, search, and seizure, Eddleman was in another plane ready to take off and follow the Arthur Brown aircraft if the agents had decided not to make an arrest at that time. (Tr. 151, 155-156.)

Petitioner subsequently was charged together with co-defendants Montgomery and Ruby Louise Swartz with con-

spiracy to possess heroin with intent to distribute, importation of heroin, and possession of heroin with intent to distribute. Petitioner was granted a severance and a separate trial. Petitioner's motion to suppress was denied and his trial proceeded. During the trial, several critical bench conferences took place which were not recorded. (Tr. 11, 196.) The Government's case for conspiracy rested essentially on proof that Petitioner (1) had used an alias at the motel; (2) was present with Montgomery and Swartz for much of the time during the several days preceding the arrest; and (3) had stated he had met Montgomery and Swartz in El Paso, even though it was clear he had known Montgomery in Detroit since he had Montgomery's Detroit address recorded on some papers found on his person. Petitioner did not take the stand in his defense. The jury returned a verdict of guilty on Count One of the indictment and not guilty on Count Three. Count Two of the indictment was dismissed on the Government's motion. (Tr. 7.) Petitioner was sentenced by the court to imprisonment for a term of 12 years, with a special parole term of 15 years.

Petitioner thereupon perfected his appeal to the United States Court of Appeals contending his conviction was invalid in that (1) there was insufficient evidence proferred by the Government to support a conspiracy conviction; (2) his motion to suppress was improperly denied; and (3) failure to record crucial bench conferences constituted reversible error. It is, of course, axiomatic that Petitioner was entitled to a resolution of these issues by a fair, impartial, and unbiased panel of three judges. However, when the decision was rendered, Petitioner discovered that Circuit Judge Charles Clark was a member of the panel that decided his appeal. Petitioner thereupon filed a petition for rehearing in banc contending that he had

been denied his right to a fair, impartial, and unbiased panel since Circuit Judge Clark sat on the panel deciding the appeal of his alleged co-conspirator, Paul L. Montgomery, in *United States* v. *Montgomery,* 554 F. 2d 754, (5th Cir. 1977), rehearing denied 558 F. 2d 311 (5th Cir. 1977). In *Montgomery,* the panel, in an opinion authored by Judge Clark, concluded:

> [T]he conspiracy conviction can still stand if there exists an adequate evidentiary basis for a finding that a conspiracy existed with McGarrity alone. *United States* v. *Lance,* 536 F. 2d 1065 (5th Cir. 1976); *United States* v. *Cabrera,* 447 F. 2d 956 (5th Cir. 1971). McGarrity's use of an alias, his knowledge of both Montgomery's actual name and address and his alias, coupled with his presence with Montgomery through much of this episode constitute sufficient evidence of conspiracy. *United States* v. *Evers, supra;* see *United States* v. *Reynolds,* 511 F. 2d 603 (5th Cir. 1975). The status of Swartz as a conspirator is not the focus of our decision. The evidence that Montgomery conspired with McGarrity was much stronger than the evidence that Montgomery conspired with Swartz. Although we have held that the jury could not have convicted Montgomery for conspiring with Swartz, they could have believed Montgomery conspired with McGarrity. That is enough. 554 F. 2d, at 756.

Here embodied in a published opinion is Judge Clark's assessment of the Montgomery-McGarrity conspiratorial relationship. Nonetheless, the Fifth Circuit Court of Appeals denied Petitioner's petition for rehearing.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW SUSTAINING THE SEARCH OF PETITIONER'S ALLEGED CO-CONSPIRATOR'S LUGGAGE IS IN DIRECT CONFLICT WITH UNITED STATES v. CHADWICK, 97 S. CT. 2476 (1977), AND THE JUSTIFICATION GIVEN THAT UNITED STATES v. CHADWICK, 97 S. CT. 2476 (1977), IS NOT RETROACTIVE PRESENTS A QUESTION OF SUCH IMPORTANCE AND SIGNIFICANCE THAT IT SHOULD BE RESOLVED BY THIS COURT.

The court below concluded that the search of Petitioner's alleged co-conspirator's luggage was valid "for the reasons stated in [*United States* v. *Montgomery,* 554 F. 2d 754, (5th Cir. 1977), rehearing denied, 558 F. 2d 311 (5th Cir. 1977)]." (Appendix, page 4a.) In the *Montgomery* opinion the court upheld the search even though it might be invalid as inconsistent with the rationale of *United States* v. *Chadwick,* 97 S. Ct. 2476 (1977), since "under *United States* v. *Peltier,* 422 U.S. 531 . . . it is evident *Chadwick* is not to be applied retroactively." *United States* v. *Montgomery,* 558 F. 2d 311, 312 (5th Cir. 1977).

Petitioner contends that the *Peltier* rationale is not applicable where this Court is merely reaffirming *settled* doctrine. We note that this Court in *Chadwick* reaffirmed the *"settled* constitutional principle . . . that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable Government invasions of legitimate privacy concerns. . . ." 97 S. Ct., at 2843. Here, as

in *Chadwick,* there was no exigency calling for an immediate search. "The agents had no reason to believe that the . . . [luggage] contained explosives or other inherently dangerous items, or that it contained evidence which would lose its value unless the . . . [luggage] was opened at once." 97 S. Ct., at 2480. We note that the record reveals that Agent Staton was positioned upon the left wing and Agent Gomez was positioned upon the right wing of Petitioner's airplane. (M 16.) Montgomery, Swartz, and the Petitioner were told to get out of the airplane. *Ibid.* The engine had not been started. (M 17.) After the people had been searched it was clear that no weapons or contraband were within their immediate control: "There was quite a bit of luggage in the *rear* of the plane." (M 17.) Further, a custom's aircraft was positioned to watch the plane seized and to follow it if it took off. (Tr. 151.) The agents were informed about the plane on April 20, 1976, and knew they might seize it for at least 2 days prior to the actual seizure. (M 18, 22, 24, 34, 36-37, 40.) This knowledge is further evidenced in that, on April 23, 1976, the agents had positioned themselves near Petitioner's plane pretending to work on another airplane. (M 20.) The conclusion is compelled that the search was unreasonable in light of all these facts and circumstances.

Petitioner contends that even without the clarifying *Chadwick* opinion existing constitutional doctrine rendered the search invalid. For a considerable period of time it has been accepted as axiomatic that the Fourth Amendment protects persons and their reasonable expectations of privacy. *Katz* v. *United States,* 389 U.S. 356 (1967). Early on it was said:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which

> reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers making a search without a warrant would reduce the Amendment to a nullity . . . .* Where the right to privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. *Johnson* v. *United States,* 333 U.S. 10, 13-14 (1948) (Emphasis added).

The rule is necessarily fundamental within our constitutional framework:

> Any other rule would undermine the "right of the people to be secure in their persons, houses, papers and effects," and would obliterate one of the most fundamental distinctions between *our form of government, where officers are under the law, and the police state where they are the law. Johnson, supra,* 333 U.S., at 17 (Emphasis added).

The Fourth Amendment, evolving through societal change and tempered with historical perspective, "thus gives concrete expression to a right of the people which is basic to a free society." *Camara* v. *Municipal Court,* 387 U.S. 523, 528 (1967).

> Nevertheless, one governing principle, justified by history and by current experience has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it is authorized by a valid search warrant. *Camara, supra,* 387 U.S., at 523.

See *Coolidge* v. *New Hampshire,* 403 U.S. 443, 454-455 (1971); *Cady* v. *Dombrowski,* 413 U.S. 433, 439 (1973).

In *Camara, supra,* the issue was whether a new exception to the Warrant Clause of the Fourth Amendment should be carved out. The Court noted:

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *Camara, supra,* 387 U.S., at 533 (citing *Schmerber* v. *California,* 384 U.S. 757, 770-771).

Petitioner respectfully contends, with this in mind, that no governmental purpose would have been frustrated had a warrant been required in the present situation. Thus, case law existing prior to *Chadwick* mandates the conclusion that Petitioner's case was wrongly decided. This result is inescapable since the Fourth Amendment:

> merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy. *Camara, supra,* 387 U.S., at 539 (Citations omitted.)

Of course the rights "against unlawful search and seizure are to be protected even if the same result might have been obtained in a lawful way." *Coolidge* v. *New Hampshire,* 403 U.S. 443, 451 (1971). Moreover:

> The exceptions are "jealously and carefully drawn: and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." The burden is on those who seek the exemption to show the need for it. *Ibid.,* at 455.

Petitioner contends that the burden was not met, for as the Court has admonished:

> The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances" . . . . [*T*]*o expand the scope of such an intrusion to the seizure of objects . . . which the police knew in advance they . . . intended to seize, would fly in the face of the basic rule* that no amount of probable cause can justify a warrantless seizure. *Coolidge, supra,* 403 U.S., at 470-471.

Petitioner contends that the Supreme Court's admonishment has not been heeded by the Fifth Circuit:

> Since the police knew of the presence of the automobile [airplane] and planned all along to seize it, there was no "exigent circumstance" to justify their failure to obtain a warrant. *Coolidge, supra,* 403 U.S., at 478.

Petitioner further urges that it must be remembered that:

> The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the results of scores of cases in courts all over this country. *It is not an inconvenience to be somehow "weighed" against claims of police efficiency.* It is, or should be, an important working part of our machinery of government, working as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" who are a part of our

> system of law enforcement. *If it is to be a true guide to constitutional police action, rather than just a pious phrase, then "the exceptions cannot be enthroned into the rule."* *Coolidge, supra,* 403 U.S., at 481. (Emphasis added.)

Petitioner respectfully contends that this is not a case where a lawful custodial arrest gave rise to authority to search *his person, Gustafson* v. *Florida,* 414 U.S. 260 (1973); *United States* v. *Robinson,* 414 U.S. 218 (1973); *Cupp* v. *Murphy,* 412 U.S. 291 (1973); nor a personal search occurring later at a place of detention. *United States* v. *Edwards,* 415 U.S. 800 (1974).

This is not a situation where a search "incident to a lawful arrest" may extend to a search of the area in the "possession" or under the "control" of the arrestee. *Chimel* v. *California,* 395 U.S. 752, 760 (1969). As this Court observed in *Chadwick,*

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. *Chadwick, supra,* 97 S. Ct., at 2485.

Nor is this a case where a car, not a repository of personal effects, may be searched for a variety of reasons. See, *e.g., South Dakota* v. *Opperman,* 428 U.S. 364 (1976); *Texas* v. *White,* 423 U.S. 67 (1975); *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Cooper* v. *California,* 386 U.S. 58 (1967).

Here a repository of personal effects was searched, yet no exigent circumstances existed. The luggage involved no diminished expectation of privacy because, for example,

"[i]t travels public thoroughfares where both its occupants and its contents are in plain view." *Cardwell* v. *Lewis,* 417 U.S. 583, 590 (1974). Nor is this a case where the expectation of privacy is diminished because "the extent of police-citizen contact . . . will be substantially greater than police-citizen contact in a home or office." *Cady* v. *Dombrowski,* 413 U.S. 433, 441 (1973).

Petitioner respectfully contends that the luggage search presently in issue is controlled by *United States* v. *Chadwick,* 97 S.Ct. 2476 (1977), because "[t]he word automobile [airplane] is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge* v. *New Hampshire,* 403 U.S. 443, 461-462 (1971). Since Petitioner's appeal is presently pending, *Chadwick, supra,* applies, particularly since the Court in *Chadwick* merely reaffirmed the "settled constitutional principle . . . that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable Government invasions of legitimate privacy interests. . . ." 97 S. Ct., at 2483. Moreover, the efficient administration of justice demands that the Court decide the important question of the retroactivity of *Chadwick* as soon as possible.

Given the invalidity of the search, it follows that Petitioner's motion to suppress was improperly denied since in a federal prosecution such as this the Fourth Amendment precludes the use of evidence obtained by means of an illegal search and seizure. *Weeks* v. *United States,* 232 U.S. 383 (1914).

II.

THE DECISION OF THE FIFTH CIRCUIT THAT THE EVIDENCE WAS SUFFICIENT TO CONVICT PETITIONER - McGARRITY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

As noted above, the Petitioner was convicted under 21 U.S.C. § 846 (1970) of conspiracy to possess heroin, a Schedule I Controlled Substance, with intent to distribute. The Petitioner filed a motion for acquittal based on insufficiency of the evidence both at the conclusion of the State's case and at the end of trial. (Tr. 207, 232.) Both motions were denied. (Tr. 208-209, 232.) It is significant to note that the prosecution dropped the substantive charge of Count II against Petitioner and the jury acquitted Petitioner of the possession charge of Count III.

Mr. Justice Holmes has termed a conspiracy a "partnership in criminal purposes." *United States* v. *Kissel,* 218 U.S. 601, 608 (1910). Historically, the use of the conspiracy charge has been suspect. This Court has "repeatedly warned that it will disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U.S. 391, 404 (1957). The Fifth Circuit, by its action, has condoned such an abuse of power in utilizing the conspiracy charge in the circumstances disclosed by the record, thereby depriving Petitioner of his right to due process of law.

This conclusion is evident since the Fifth Circuit, by affirming the decision of the District Court, has, in effect, said that little more than mere presence is sufficient to infer a conspiratorial agreement.

As in the *Montgomery* case, the record now before us discloses that McGarrity used an alias during the events which led to his arrest. He was present with Montgomery through almost all of the events surrounding the acquisition of the heroin by Montgomery. Furthermore, immediately after the arrest McGarrity said to the arresting officer that he had only just met Montgomery and Swartz (to whom he referred by their aliases) at the El Paso Rodeway Inn and had merely offered to give them a ride in his private airplane from El Paso, Texas to Detroit, Michigan.

We find that there was substantial evidence from which the jury would conclude that this exculpatory statement was false, it appearing that McGarrity had, on his person, the correct name and the correct business and residence address of Montgomery in Detroit, Michigan. Further, he had on his person a writing setting out Montgomery's alias, the telephone number of Rodeway Inn where he was staying while making the heroin transaction, and Montgomery's room number and telephone extension there. All of the circumstances, coupled with a finding that the defendant gave a false exculpatory statement formed a sufficient basis for the jury's conclusion that McGarrity was a conspirator with Montgomery. (Appendix, page 5a.)

One searches in vain to discover in this language any substantial basis for concluding that there existed a McGarrity-Montgomery agreement concerning illicit possession of heroin with intent to distribute. And the "gist of the offense of conspiracy . . . is agreement among conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States* v. *Falcone,* 311 U.S. 205, 210 (1940).

Knowledge that conspiracy exists is a minimum requirement for establishing an agreement to join and cooperate

in an illegal venture. "Without the knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal." *Direct Sales Co.* v. *United States,* 319 U.S. 703, 711 (1943). Since "[t]hose having no knowledge of the conspiracy are not conspirators . . ." *Ibid.,* at 210, a conviction based upon evidence insufficient to prove an agreement results in a serious deprivation of the accused's right to due process of law. *Thompson* v. *City of Louisville,* 362 U.S. 199, 206 (1960).

It appears that the Fifth Circuit, finding substantial evidence extant to justify a jury conclusion that an exculpatory statement by Petitioner was false, concludes that other innocent activities by Petitioner provided a "sufficient" basis for concluding Petitioner conspired with Montgomery. In this context, the court necessarily adopts a less than substantial evidence standard to sustain Petitioner's conspiracy conviction. Given the tenuous nature of the Government's case, only a slight evidence standard could have been employed, which perhaps explains the failure of the court to articulate precisely what standard it was using. Thus this case provides a graphic illustration of how "charges of conspiracy are . . . made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." *Direct Sales Co.* v. *United States,* 319 U.S. 703, 711 (1943). But, without an appropriately stringent standard of sufficiency of evidence articulated by this Court, such results are reasonably anticipated.

A review of the pertinent case law concerning the sufficiency of the evidence standard to justify conspiracy convictions shows an intra-Circuit conflict, as well as serious and recurring inter-Circuit conflicts. Efficiency and the sound administration of justice demand that these conflicts be

resolved. This Court could significantly promote truth and fairness by providing the necessary impetus toward eliminating the type of egregious conviction, based upon the flimsy and speculative evidence that was produced in the instant case, by promulgating a clear standard establishing the necessary degree of stringency of sufficiency of evidence required to convict a person on a conspiracy charge.

The Courts of Appeals often apply, as here, a "slight evidence" standard to sustain an individual's involvement in a criminal conspiracy, although the requisite evidence required to meet the standard varries significantly among the Circuits. A survey of these variations illustrates the compelling need for uniformity and guidance.

Variations of the "slight evidence" standard include: (1) The enlightened "slight evidence" standard. *United States* v. *Duckett,* 550 F. 2d 1027, 1031 (5th Cir. 1977) ("slight evidence" is a shortened form of the sounder principle that the circumstances connecting an accused to a conspiracy must be substantial in weight and context; although if taken in the abstract, they would appear slight); *United States* v. *Harris,* 542 F. 2d 1283, 1305 (7th Cir. 1975) (burden of proof for conspiracy conviction is not any different than that required for any other crime). (2) The knowledgeable "slight evidence" standard, *United States* v. *La Vecchia,* 513 F. 2d 1210, 1218-1219 (2d Cir. 1975) (evidence must support an inference that the defendant knew he was involved in criminal enterprise of substantial scope); *United States* v. *Monroe,* 552 F. 2d 860, 863 (9th Cir. 1977) (evidence of concert of action, all parties working together understandably with a single design for accomplishment of a common purpose, shows an agreement); *United States* v. *Perry,* 550 F. 2d 523-529

(9th Cir. 1977) (prosecution must prove that "each defendant knew or had reason to know scope of distribution and retail organization involved with the illegal narcotics and had reason to believe that their own benefits derived from the operation were dependent upon the success of the entire venture"). Compare, *United States* v. *Valdovinos*, 558 F. 2d 531, 533 (9th Cir. 1977) (only slight evidence is required, viewing this evidence most favorable to the government) with *United States* v. *Garcia-Rodriguez*, 558 F. 2d 956, 960 (9th Cir. 1977) (Little evidence is required . . . even though he is but slightly involved in bringing the conspiracy to its attempted conclusion) with *United States* v. *Kearney*, 560 F. 2d 1358, 1362 (9th Cir. 1977) (only slight evidence); *Collins* v. *United States*, 383 F. 2d 296, 300 (10th Cir. 1967) (Defendant must knowingly contribute to the furtherance of the conspiracy). *Valdovinos, supra, Garcia-Rodriguez, supra,* and *Kearney, supra,* indicate an intra-Ninth Circuit conflict. In no way can the "knowledgeable slight evidence" rule be reconciled with those cases. (3) Another standard is the "slight evidence which avoids review" enunciated in *United States* v. *Votteller*, 544 F. 2d 1355, 1359 (6th Cir. 1976) (once conspiracy is established, only slight evidence is necessary to connect a defendant with it); *United States* v. *Smith*, 561 F. 2d 8, 12 (6th Cir. 1977) (to the same effect). Nor can *United States* v. *Hart*, 551 F. 2d 738 (6th Cir. 1977) be reconciled with the aforementioned Sixth Circuit cases (substantial evidence of an agreement membership in the conspiracy, and the carrying out of one or more of the overt acts). *Ibid.*, at 741. Compare *United States* v. *Carlson*, 547 F. 2d 1346, 1360 (8th Cir. 1976) (slight evidence may be substantial and, therefore, sufficient to support a conviction) with *United States* v. *Collins*, 552 F. 2d 243, 245 (8th Cir. 1977) (evidence which otherwise seems

slight) with *United States* v. *Scholle*, 553 F. 2d 1109, 1118 (8th Cir. 1977) (even slight evidence connecting a defendant may constitute sufficient evidence); *United States* v. *Losing*, 560 F. 2d 906, 912 (8th Cir. 1977) (same); *United States* v. *Schmaltz*, 562 F. 2d 558, 560 (8th Cir. 1977) (same).

Intra and inter-Circuit conflict thus abound in this area of the criminal law. In addition, the Fifth Circuit itself has a variety of standards: *United States* v. *Pruett*, 551 F. 2d 1365, 1369 (5th Cir. 1977) (evidence of knowledge must be clear and not equivocal); *United States* v. *Netterville*, 553 F. 2d 903, 911 (5th Cir. 1977) (only slight evidence); *United States* v. *Trevino*, 556 F. 2d 1265, 1268 (5th Cir. 1977) (when defendants are clearly connected to the conspiring group or acting in such a manner as unmistakably to forward its purpose slight additional evidence suffices to infer knowing participation); *United States* v. *Palacios*, 556 F. 2d 1359, 1364 (5th Cir. 1977) (evidence must show that the defendant associated himself with the venture, participated in it, and acted to make it succeed); *United States* v. *Bolts*, 558 F. 2d 316, 325 (5th Cir. 1977) (where persons are clearly connected slight additional evidence to infer knowing participation; *United States* v. *Gutierrer*, 559 F. 2d 1278, 1281 (5th Cir. 1977) (evidence must be clear and not equivocal); *United States* v. *Klein*, 560 F. 2d 1236 1243 (5th Cir. 1977) (In order to fasten guilt on one accused of being a co-conspirator, it is necessary to prove that he actively participated in the conspiracy charged).

These standards are obviously irreconcilable. The need for guidance and uniformity is compelling. A recent Fifth Circuit decision, *United States* v. *Duckett*, 550 F. 2d 1027 (5th Cir. 1977), provides probably the best support for

this conclusion. The *Duckett* case is in most factual respects similar to that of Petitioner. However, Petitioner was convicted, while the evidence was found insufficient to convict by the *Duckett* Court. Petitioner directs this Court's attention to the close parallel. The Fifth Circuit in *Duckett* held:

> Although Duckett [McGarrity] was present with the conspirators at the airport, it is well settled that mere presence is insufficient, without more, to sustain a conviction for conspiracy. United States v. Di Re, 332 U.S. 581, 593 . . . (1948). There is no evidence that Duckett [McGarrity] ever touched the red suitcase [the clothes bag], much less that he was aware of its contents. The joint presence of the defendant and the conspirators at the airport and the preexisting relationship between the parties is insufficient alone to prove beyond a reasonable doubt that defendant had a part in the conspiracy. Cf. United States v. Duke, 423 F. 2d 387 (5th Cir. 1970). Thus the fact that Duckett approached Gray and Gaston for a key, and that Gaston possessed papers with both Duckett's true name and alias do not provide a legitimate basis for inferring his participation in a conspiracy to import heroin. Cf. United States v. Cantu, 504 F. 2d 387 (5th Cir. 1974).
>
> The fact that Duckett [McGarrity] was using an alias is suspicious, but it is, without more, equally consistent with a variety of explanations. . . . Finally, the testimony that he [McGarrity] had been in Gray's home [the airplane] when heroin was present can only be considered as showing a long-standing acquaintanceship with Gray, since there was no testimony that Duckett [McGarrity] had seen or been aware of the heroin at the time.
>
> From this review of the evidence concerning Duckett's [McGarrity's] activities on the day [days] in question, it is clear that the jurors should have entertained a

> reasonable doubt about his guilt. While his course of conduct is odd, and perhaps difficult to explain [McGarrity's course of conduct was neither odd nor difficult to explain], the links between Duckett [McGarrity] and the conspiracy are so tenuous that, making all 'reasonable inferences and credibility choices as will support' the guilty verdict, United States v. Wayman, 510 F. 2d 1020, 1026 (5th Cir.), *cert. denied,* 423 U.S. 846 . . . (1975), we conclude that no reasonable mind could find guilt beyond a reasonable doubt. 550 F. 2d, at 1030-1031.

The conclusion is mandated that such significant and recurring problems need be resolved. These conflicts and the interest of justice demand uniformity and guidance by this Court. For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

III.

THE DECISION BY THE COURT BELOW THAT UNRECORDED BENCH CONFERENCES CONSTITUTE HARMLESS ERROR IS AN ERRONEOUS DETERMINATION OF AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Court Reporter Act, 58 Stat. 5 (1944), 28 U.S.C. § 753, was enacted after extensive effort by members of both bench and bar concerned that no verbatim recording of federal court proceedings was required by federal law. The case of *Miller* v. *United States,* 317 U.S. 192 (1942), which involved the construction of the exception to the federal kidnapping statute "in the case of a minor, by a parent thereof," provided a major impetus for enactment of the Court Reporter Act. See *Poole* v. *United States,* 250 F. 2d 396, 399 (D.C. Cir. 1957). This Court, instead of dealing with the exception provision, remanded the case for preparation of a bill of exceptions by the court of appeals. The Court observed that:

> There is no law of the United States creating the position of official court stenographer and none requiring the stenographic report of any case, civil or criminal. . . .
>
> At the instance o fthe Conference of Senior Circuit Judges, legislation has been introduced in Congress to provide an official system of reporting and to defray the cost of it. That legislation . . . will, if adopted, obviate the difficulties presented in this case. 317 U.S., at 197.

The Court Reporter Act, enacted one year after the Court decided *Miller,* specifically requires that:

> One of the reporters . . . shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and *shall record verbatim* by shorthand or by mechanical means . . . (1) *all proceedings in criminal cases* had in open court. 28 U.S.C. § 753 (b). (Emphasis added.)

This statute imposes a mandatory obligation on the court reporter to make a verbatim transcript of *all* proceedings in criminal cases – an obligation that cannot be waived by either the court or the parties. This is clear from (1) the mandatory and comprehensive language of the provision (*shall – all*), (2) the explicit authorization for waiver in non-criminal cases by the parties with the approval of the judge, 28 U.S.C. § 753 (b) (2), and (3) the legislative history. As to the latter, the pertinent House Report states that "all proceedings in criminal cases, whether in connection with plea, trial, or sentence are to be recorded." H.R. Rep. No. 868, 78th Cong., 1st Sess. 6 (1943). See also Hearings before the Senate Committee on the Judiciary on S. 620, 78th Cong., 1st Sess. 31 (1943); 89 Cong. Rec. 10,873 (1943).

Strict compliance with the mandatory verbatim recording requirement of § 753 (b) not only enables counsel to demonstrate exactly what transpired at the trial, but where, as here, different counsel take the appeal of a case, the verbatim transcript is the only means of assuring that the appellate counsel and the appellate court are accurately apprised of the proceedings below. See *United States* v. *Upshaw,* 448 F. 2d 1218, 1223 (5th Cir. 1971), cert. den. 405 U.S. 934 (1972). In *Upshaw,* where the opening and closing statements of defense counsel were not recorded in accordance with a local rule, the court reversed the defendant's conviction for lack of a complete transcript since the

State had not demonstrated that "no substantial rights of the [defendant] were adversely affected by [the] omissions . . . ." 448 F. 2d, at 1224. The court in *Upshaw* also noted that:

> Since compliance with the Act is not difficult and the transcript is of crucial importance to the defendant (and to the appellate court for meaningful review), exceptions should be few and narrowly construed. United States v. Workcuff, 137 U.S. App. D.C. 263, 422 F. 2d 700 (1970).
>
> 448 F. 2d, at 1223-24.

Another benefit derived from strict compliance with § 753 (b) is that it removes speculation about what transpired and thereby eliminates costly extensive collateral hearings attempting to reconstruct what was said. The Fourth Circuit recently reversed a guilty plea determination because there was less than a complete record of the hearing. The court observed that a "failure of strict compliance [with § 753 (b)] on the part of the district judge, the court reporter, or the court clerk . . . will only result in unnecessary post-conviction hearings to determine what was done when the most accurate record is a transcript of what actually took place." *Herron* v. *United States,* 512 F. 2d 439, 441 (4th Cir. 1975).

In Petitioner's case, the court reporter failed to record several bench conferences. One conference occurred at the commencement of the trial (Tr. 11) and the other toward the end of the Government's case (Tr. 196).

The failure of the reporter to provide a verbatim record of these bench conferences is especially significant since the second occasion when this happened was at the conclusion of the crucial testimony of a Government witness. (Tr. 196.) Without a verbatim record of bench conferences,

one can only speculate about what was said. This particular bench conference involved only the United States Attorney and the Judge.

The relevant standard for assessment of this error propounded in *United States* v. *Upshaw,* 448 F. 2d 1218, 1224 (5th Cir. 1971):

> The court must be able to say affirmatively that no substantial rights of the appellant were adversely affected by the omissions from the transcript; that is, *it must exclude the possibility of any error other than harmless error.* (Emphasis added.)

The court below found failure to record bench conferences error, but harmless because the context revealed that at the second unrecorded bench conference the only "reasonable conclusion" was that the judge had learned about a stipulation and that the Government was not prepared to call a witness in lieu of a chemist. (Appendix, page 7a.) We note the following:

(1) The record does not support the "reasonable conclusion of the court. The information the court infers the judge obtained during the bench conference was available from the events during the trial prior to the bench conference, (Tr. 184) and, in fact, after the conference the court asked the Government to call its next witness. (Tr. 197.)

(2) The test of *Upshaw* requires *exclusion* of the possibility of error, not a demonstration that some harmless matters were discussed at the bench conference. For all we know, the District Court may have taken an adversarial stance during the two bench conferences making suggestions to the United States Attorney about the sufficiency of the evidence, which would certainly pose a serious threat to the right to an impartial and disinterested judge. See

In re Murchison, 349 U.S. 133 (1955); *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972).

(3) The court ignored the existence of the first bench conference, which it never justified. The Government attempted to justify both conferences by contending that defense counsel was present. That, of course, cannot justify unrecorded bench conferences, especially in view of the defendant's need to know exactly what his counsel (his assistant) is doing on his behalf. See *Faretta* v. *California,* 422 U.S. 806, 816 (1975). Without a record of his counsel's performance, how could a defendant substantiate (or even know about) ineffective assistance of counsel?

The Courts of Appeals have not uniformly interpreted the Court Reporter Act. Some courts have held the responsibility for making sure court proceedings in criminal cases are recorded rests with counsel. *United States* v. *Ross,* 477 F. 2d 551 (6th Cir. 1973), cert. denied *sub nomme Sain* v. *United States,* 414 U.S. 912 (1973). Others stress that it is the court that has the responsibility to require compliance with the Act. *Parrott* v. *United States,* 314 F. 2d 46, 47 (10th Cir. 1973). In *Parrott,* the court correctly concluded, contrary to the holding below in the instant case, that without a record it is impossible to determine whether the error is harmless. Such a conclusion appears eminently reasonable since the lack of the record precludes proof of error by the very means the Court Reporter Act provides to demonstrate what occurred.

Petitioner submits that this important question of federal law should now be resolved by this Court.

IV.

THE DETERMINATION BELOW THAT IT IS PERMISSIBLE FOR AN APPELLATE JUDGE TO DECIDE A CASE INVOLVING A MATTER IN WHICH HE APPEARS PREJUDICED IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is, of course, axiomatic that Petitioner is entitled to a fair, impartial and unbiased panel where appeal is given. For "nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." *Berger* v. *United States,* 255 U.S. 22, 36 (1921). Hence, "our system of law has always endeavored to prevent *even the probability of unfairness.*" *In re Murchison,* 349 U.S. 133, 136 (1955). (Emphasis added.) This is required because "justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U.S. 11, 14 (1954).

> Every procedure which would offer a *possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or *which might lead him not to hold the balance nice, clear and true between the State and the accused,* denies the latter due process of law. *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927). (Emphasis added.)

This test was reaffirmed in *Ward* v. *Village of Monroeville,* 409 U.S. 57, 60 (1972). Petitioner contends that this test was not met since Circuit Judge Clark sat on the panel deciding the appeal of his alleged co-conspirator, Paul L. Montgomery, in *United States* v. *Montgomery,* 554 F. 2d 754 (5th Cir. 1977), rehearing denied, 558 F. 2d 311 (5th Cir. 1977). In *Montgomery,* the panel, in an opinion authored by Judge Clark, concluded:

> [T]he conspiracy conviction can still stand if there exists an adequate evidentiary basis for a finding that a conspiracy existed with McGarrity alone. *United States* v. *Lance,* 536 F. 2d 1065 (5th Cir. 1976); *United States* v. *Cabrera,* 447 F. 2d 956 (5th Cir. 1971). McGarrity's use of an alias, his knowledge of both Montgomery's actual name and address and his alias, coupled with his presence with Montgomery through much of this episode constitute sufficient evidence of conspiracy. *United States* v. *Evers, supra;* see *United States* v. *Reynolds,* 511 F. 2d 603 (5th Cir. 1975). The status of Swartz as a conspirator is not the focus of our decision. The evidence that Montgomery conspired with McGarrity was much stronger than the evidence that Montgomery conspired with Swartz. Although we have held that the jury could not have convicted Montgomery for conspiring with Swartz, they could have believed Montgomery conspired with McGarrity. That is enough. 554 F. 2d, at 756.

Here embodied in a published opinion is Judge Clark's assessment of the Montgomery-McGarrity conspiratorial relationship. Commenting on the propriety of a judge hearing an appeal from the decision of a case or issue tried below by him, Walter Hill observed:

> Such an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless also a published decision. Hill, Address to the American Bar Association, 12 *A.B.A. Rep.* 289, 307 (1889).

In the instant case, the panel consisted of Judges Thornberry, Clark, and Hill. Although the opinion is authored by Judge Hill, and is unanimous, if Petitioner is correct in his assessment of probability of bias, then the panel is an improperly constituted tribunal since the Petitioner is entitled to a determination by *three* impartial judges. See *Glidden* v. *Zdanok,* 370 U.S. 530 (1962), rehearing denied, 371 U.S. 854 (1962).

It is not surprising to discover that Petitioner's panel, although admitting that the evidence in the *Montgomery* case was not to be considered in Petitioner's case, concluded in a parallel manner to the Montgomery panel:

> As in the *Montgomery* case, the record now before us discloses that McGarrity used an alias during the events which led to his arrest. He was present with Montgomery through almost all of the events surrounding the acquisition of the heroin by Montgomery. Furthermore, immediately after the arrest McGarrity said to the arresting officer that he had only just met Montgomery and Swartz (to whom he referred by their aliases) at the El Paso Rodeway Inn and had merely offered to give them a ride in his private airplane from El Paso, Texas to Detroit, Michigan.
>
> We find that there was substantial evidence from which the jury would conclude that this exculpatory statement was false, it appearing that McGarrity had, on his person, the correct name and the correct business and residence address of Montgomery in Detroit, Michigan. Further, he had on his person a writing setting out Montgomery's alias, the telephone number of the Rodeway Inn where he was staying while making the heroin transaction, and Montgomery's room number and telephone extension there. All of the circumstances, coupled with a finding that the defendant gave a false exculpatory statement formed a sufficient basis for the jury's conclusion that McGarrity was a conspirator with Montgomery. *United States* v. *Johnson,* 513 F. 2d 819 (2d Cir. 1975); *United States* v. *Sutherland.* 463 F. 2d 641 (5th Cir. 1972), *cert. denied,* 409 U.S. 1078, 93 S. Ct. 698, 34 L.Ed. 2d 668 (1972). (Appendix, page 5a.)

Of course, this conclusion, given the facts, is, as noted above, completely antipodal to the decision of the court in *United States* v. *Duckett,* 550 F. 2d 1027 (5th Cir. 1977).

Petitioner respectfully urges that Judge Clark's *Montgomery* decision creates a high probability of inducing a "Tumey temptation" to forget "the burden of proof required to convict the defendant." *Tumey, supra,* at 532. This conclusion is buttressed by noting that all the aforementioned evidentiary factors were insufficient in *Duckett* and also in *United States* v. *Salinas-Salinas,* 555 F. 2d 479 (5th Cir. 1977). There the court held, at 473:

> The essential elements of a criminal conspiracy are an agreement among the conspirators to commit an offense against the United States and an overt act by one of them in furtherance of the agreement. United States v. Isaacs, 5 Cir. 1975, 516 F. 2d 409, cert. den., 423 U.S. 936, 96 S. Ct. 295, 46 L. Ed. 2d 269. The government must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and with that knowledge intentionally did something to further or carry on that conspiracy. *Causey* v. *United States,* 5 Cir. 1965, 352 F. 2d 203.
>
> Quite obviously there was a conspiracy and conspirators, never identified, were observed at the scene. The problem is whether there was adequate proof to connect this defendant with the conspiracy. Mere presence at the scene of a crime is insufficient to establish participation. *United States* v. *Falcone,* 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940); *United States* v. *Owen,* 5 Cir. 1974, 492 F. 2d 1100, *cert. den.,* 419 U.S. 965, 95 S. Ct. 227, 42 L. Ed. 2d 180.

Further, Judge Clark's "slight evidence test," as noted above, misses the mark. Perhaps the "Tumey temptation" caused misapplication of the standard, for the standard should not be "slight evidence." Obviously, a preconceived notion of Montgomery's guilt could cause misapplication of the proper test. Petitioner contends that where issues of fact and law are as inexplicably intertwined as in the *Montgomery-McGarrity* cases, Judge Clark should have recognized the "Tumey temptation" and recused himself. See *Berger* v. *United States,* 255 U.S. 22 (1921); *In re Grand Jury Proceedings,* 559 F. 2d 234, 237 (5th Cir. 1977). For, as Mr. Justice Frankfurter so eloquently put it:

> The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. Where there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact. *Utilities Comm.* v. *Pollak,* 343 U.S. 451, 466-467 (1952).

It must be remembered that judicial officers "do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do." *B. Cardozo, The Nature of the Judicial Process,* 168 (1921).

Judge Clark's inadvertent use of the wrong test and apparent inability to objectively decide Petitioner's case demanded recusal.

> Any justice, judge, magistrate or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. § 455 (a).

Petitioner contends that it is quite reasonable to assume that Judge Clark succumbed to the "Tumey temptation," for a finding of insufficiency as to him would appear to conflict with Clark's *Montgomery* decision. The situation demanded recusal; this conflict causing a great appearance of impropriety. The question is of great importance for fair administration of justice and justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

OVID C. LEWIS
Chase Law School
1401 Dixie Highway
Covington, Kentucky 41011

Counsel for Petitioner

APPENDIX

OPINION OF THE COURT OF APPEALS

(Filed October 3, 1977)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

THOMAS HAMLIN McGARRITY, JR.,
Defendant-Appellant.

No. 76-3744
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Oct. 3, 1977.

The United States District Court for the Western District of Texas, William S. Sessions, J., convicted defendant of conspiracy to possess heroin with intent to distribute, and defendant appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) search of private aircraft and subsequent seizure of heroin found therein were lawful; (2) evidence was sufficient to sustain conviction, and (3) failure of court reporter to record discussion at bench did not warrant reversal of conviction.

Affirmed.

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* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409.

1. **Drugs and Narcotics**

Tip to narcotics agent from confidential informant provided probable cause for warrantless search of aircraft, and thus search of private aircraft and subsequent seizure of heroin contained therein were lawful.

2. **Judgment**

In prosecution for conspiracy to possess heroin with intent to distribute the same, court could not defer to conclusion of court in separate prosecution of co-conspirator concerning sufficiency of evidence to sustain conspiracy conviction, but, rather, court's inquiry had to be directed to evidence in defendant's separate trial.

3. **Conspiracy**

Evidence was sufficient to sustain conviction of conspiracy to possess heroin with intent to distribute the same. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

4. **Criminal Law**

While failure of record to contain verbatim report of all proceedings in open court could not be approved, failure of record to contain verbatim report of discussion at bench was harmless error in prosecution for conspiracy to possess heroin with intent to distribute the same, in view of fact that transcript indicated that discussion resulted in stipulation concerning testimony of government chemist and did not result in any prejudice to the defendant. 28 U.S.C.A. § 753 (b).

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, CLARK and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Thomas Hamlin McGarrity, Jr., appellant, was charged in a three-count indictment of (1) conspiracy to possess heroin with intent to distribute the same in violation of 21 U.S.C.A. § 846;[1] (2) importing heroin into the United States from Mexico in violation of 21 U.S.C.A. § 952 (a) (1) and 960 (a) (1)[2] and (3) possession of heroin with intent to distribute in violation of 21 U.S.C.A. § 841 (a) (1).[3]

---

[1] § 846. *Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

[2] § 952. *Importation of controlled substances*

. . .

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

• • •

§ 960. *Prohibited acts A—Unlawful acts*

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance . . . shall be punished as provided in subsection (b) of this section.

• • •

[3] § 841. *Prohibited acts A—Unlawful acts*

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

• • •

After jury trial in the Western District of Texas, El Paso Division, appellant was convicted of the charges in Count I of the indictment and brings this appeal. The Government had dismissed Count II, and the jury found Appellant not guilty of the charge in Count III.

The original indictment contained charges against two co-defendants, Paul L. Montgomery and Ruby Swartz. Prior to trial, a motion to sever was granted so that McGarrity and Montgomery were tried separately. Ultimately, the Government's motion to dismiss the indictment as to Swartz was granted.

[1] Prior to the severance, a single hearing had been held on a motion of both McGarrity and Montgomery to suppress evidence discovered and seized during the search of McGarrity's private aircraft. The trial court denied that motion. Thereafter, trial proceeded in the case against Montgomery who, having been found guilty of conspiracy and the substantive offense of possession with intent to distribute, appealed to this Court. The conviction was affirmed by another panel of this Court in the case of *United States* v. *Montgomery*, 554 F.2d 754, *petition for rehearing denied*, 558 F.2d 511 (5 Cir. 1977). After careful and independent review of the record of the suppression hearing and of the arguments advanced on behalf of McGarrity in the instant appeal, we conclude, as did this Court in the *Montgomery* case, that the search and subsequent seizure of the heroin was lawful for the reasons stated in *Montgomery*.

[2] Appellant McGarrity also asserts that the evidence adduced by the Government was insufficient to support his conviction for conspiracy. As stated above, the record of the trial of McGarrity is totally distinct from the record reviewed by this Court in *Montgomery* inasmuch as the trials were separate. Thus, even though the Court in

Montgomery found it necessary to determine whether or not there was sufficient evidence against Montgomery to support his conviction of having conspired with McGarrity, we cannot defer to the Court's conclusion on that subject in *Montgomery* because the issue presented is the sufficiency of the evidence and, thus, our inquiry must be directed to the evidence in the separate McGarrity trial.

[3] As in the *Montgomery* case, the record now before us discloses that McGarrity used an alias during the events which led to his arrest. He was present with Montgomery through almost all of the events surrounding the acquisition of the heroin by Montgomery. Furthermore, immediately after the arrest McGarrity said to the arresting officer that he had only just met Montgomery and Swartz (to whom he referred by their aliases) at the El Paso Rodeway Inn and had merely offered to give them a ride in his private airplane from El Paso, Texas to Detroit, Michigan.

We find that there was substantial evidence from which the jury would conclude that this exculpatory statement was false, it appearing that McGarrity had, on his person, the correct name and the correct business and residence address of Montgomery in Detroit, Michigan. Further, he had on his person a writing setting out Montgomery's alias, the telephone number of the Rodeway Inn where he was staying while making the heroin transaction, and Montgomery's room number and telephone extension there. All of the circumstances, coupled with a finding that the defendant gave a false exculpatory statement formed a sufficient basis for the jury's conclusion that McGarrity was a conspirator with Montgomery. *United States* v. *Johnson*, 513 F.2d 819 (2d Cir. 1975); *United States* v. *Sutherland*, 463 F.2d 641 (5th Cir. 1972), *cert. denied*, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972).

[4] Appellant further complains that, at a point during the trial, near the close of the Government's case, counsel

for the Government asked the trial judge, "May I approach the bench, Your Honor?", after which there is an entry reading " (discussion at the bench off the record.) ."

Appellant cites 28 U.S.C.A. § 753 (b) as requiring that all proceedings be recorded verbatim by the court reporter and urges that the failure of the record to contain the verbatim transcript of the "discussion" at the bench requires a reversal of this conviction.

In *United States* v. *Upshaw,* 448 F.2d 1218 (5th Cir. 1971) , *cert. denied,* 405 U.S. 934, 92 S.Ct. 970, 30 L.Ed.2d 810 (1972) , this Court reversed the defendant's conviction because the opening and closing statements of defense counsel had not been recorded, taken down, or transcribed. In *Upshaw* the Court instructed that ". . . exceptions should be few and narrowly construed."

We view this case as such an exception. While we do not endorse the failure of the record to contain a verbatim report of all proceedings in open court, we find the omission of such information in this case to be harmless. *Calhoun* v. *United States,* 384 F.2d 180 (5th Cir. 1967) ; *Burns* v. *United States,* 323 F.2d 269 (5th Cir. 1963) , *cert. denied,* 376 U.S. 907, 84 S.Ct. 660, 11 L.Ed.2d 606 (1964) .

The record shows that, at a few minutes before 4:00 p.m., counsel had completed the examination and cross-examination of a Government witness. It was at that point that Government counsel asked permission to approach the bench and the unreported discussion with the judge took place. Immediately thereafter, counsel for the Government announced, on the record, that he and the defense had arrived at a stipulation which would make it unnecessary to examine a government chemist. Then a stipulation that a substance seized from the aircraft and found to be heroin was read into the record. With the proceedings thus foreshortened, counsel for the Government had

no other witness available that afternoon. Thereupon, the judge announced to the jury that he had only just been informed that, by diligent and proper effort, counsel for the parties had been able to reach the stipulation and that, at that point, the Government was not prepared to call additional witnesses. This explanation was obviously given to the jurors so that they would understand why the judge was going to recess the trial at an early hour to be resumed on the following morning.

It is abundantly clear from a review of the entire transcript that, at the moment he asked to approach the bench, counsel for the Government was in a position to shorten the trial proceedings by the stipulation. Yet, the Court had not been informed that this could be done. Had the chemist been called as a witness his examination and cross-examination would have consumed the remainder of the afternoon session. After the reading of the stipulation and short instructions to the jury governing their treatment of it, the judge announced to the jury that he had just learned of the availability of the stipulation and that the Government was not prepared to call a witness in lieu of the chemist. There is no entry in the transcript disclosing an opportunity for the judge to have learned these things except during the unrecorded exchange between the judge and Government counsel which immediately preceded the events here discussed. The inference is inescapable that the judge learned of this constructive development in the presentation of the trial during that exchange. There being no other reasonable conclusion to draw from the record as a whole and there being nothing to indicate that any prejudice resulted to the defendant or to the ability of this Court adequately to review the proceedings in the trial court, we hold that the failure of the record to contain a verbatim transcript of that discussion to be harmless.

The search of the aircraft having been lawful, the introduction of the heroin thus discovered and seized was proper. There having been sufficient evidence of the existence of a conspiracy and McGarrity having been a part of it, judgment of the District Court is

AFFIRMED.

JUDGMENT OF THE COURT OF APPEALS

(Filed October 3, 1977)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3744
Summary Calendar

D. C. Docket No. EP-76-CR-108

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS HAMLIN McGARRITY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

Before THORNBERRY, CLARK and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission

by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 3, 1977

Issued as Mandate:

DENIAL OF PETITION FOR REHEARING

(Filed November 7, 1977)

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth, Clerk
Tel 504-539-6514
600 Camp Street
New Orleans, La. 70130

November 7, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-3744 –
U.S.A. v. THOMAS HAMLIN McGARRITY, JR.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.
See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD K. WADSWORTH, Clerk

By /s/ BRENDA M. HAUCK
Deputy Clerk

** on behalf of appellee, U. S. A.,

cc: Mr. Ovid C. Lewis
Mr. Frank B. Walker

DENIAL OF MOTION FOR REMAND

(Filed December 16, 1977)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-3744

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS HAMLIN McGARRITY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

Before THORNBERRY, CLARK and HILL, Circuit Judges.

BY THE COURT:—

IT IS ORDERED that appellant's motion for remand of this cause to the United States District Court for filing of a motion for new trial, and for recall and stay of execution of mandate pending determination of motion for new trial by the district court, is DENIED.

SUPREME COURT OF THE UNITED STATES

No. A-468

THOMAS HAMLIN McGARRITY, JR.,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 6, 1978.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 29 day of November, 1977.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. ——

THOMAS HAMLIN McGARRITY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this .... day of January, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C., 20530, Counsel for Respondent. I further certify that all parties required to be served have been served.

.....

OVID C. LEWIS

1401 Dixie Highway
Covington, Kentucky 41011

COUNSEL FOR PETITIONER